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PETITION FOR CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 616

ROBERT L. HATCHETT, JR.

v.

C. W. WILLIAMS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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The Petitioner, ROBERT HATCHETT, JR., prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, Texas, where judgment was rendered in these proceedings on December 30, 1968.

OPINIONS BELOW

The Trial Court did not write an opinion. The opinion of the Texas Court of Civil Appeals First Supreme Judicial District, sitting at Houston, Texas is officially reported at 437 S.W.2d 334 (Tex. Civ. App.—Houston, 1968, writ. ref'd., n.r.e.), Appendix "A", infra. Without opinion, the Supreme Court of the State of Texas refused Petitioner's Application for Writ of Error, with the notation, "No reversible error". Appendix "B", infra. Also without opinion, the Supreme Court of Texas denied Petitioner's Motion for Rehearing on June 25, 1969. Appendix "B", infra.

JURISDICTION

The order by the Supreme Court of Texas denying Petitioner's Motion for Rehearing was entered on June 25, 1969. Appendix "B". This petition of certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the contract in question (attached as Appendix "C") is an illegal price-fixing agreement under the anti-trust laws of the United States.

STATUTES INVOLVED

Section 1 of the Sherman Act reads in relevant part as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal . . ."

15 U.S.C. §1 (1964)

STATEMENT OF FACTS

In October, 1964, Respondent Williams contracted with Corky's Hong Kong Clothes, Inc., (Corky's) to furnish ready-made clothes for sale at Corky's store in Shreveport, Louisiana. The contract (attached as Appendix "C", infra) stated that the goods would remain the property of Williams until sold. It also provided that, without the express authority of Williams, the retail price of the goods should not be less than gross cost plus twenty (20%) percent. In February of 1965, A. L. Jackson, President of Corky's, asked permission to remove the goods to a store in Dallas, Texas. When Williams required that Corky's furnish him an acceptable guaranty of the gross cost of the inventory, Robert Hatchett, a shareholder of Corky's, signed a guaranty agreement (attached as Appendix "D", infra). Jackson delivered the agreement to Williams.

Petitioner Hatchett maintained that his signature on the guaranty agreement was conditioned on the joint signature of Mr. Robert Aitken, and that Jackson's delivery to Williams without Mr. Aitken's joint signature was improper. Despite this contention, the trial court did not allow the jury to pass on the fact issue thus raised. The Court of Civil Appeals affirmed this action, holding that the conditional delivery of the guaranty agreement was no defense because notice of the condition was not communicated to Williams. 437 S.W.2d at 339.

After the financial collapse of Corky's, an attempt was made to re-deliver the goods to Williams, but he refused to receive them on the basis of a clause in the guaranty agreement. 437 S.W.2d at 340. After the attempt to re-deliver the goods, Williams brought suit against Corky's

and Hatchett, receiving a judgment of Fifteen Thousand Thirty and 69/100 ($15,030.69) Dollars. Transcript at 43.* The Court of Civil Appeals reformed the judgment by deducting Two Hundred Sixty-Seven and 31/100 ($267.31) Dollars for accounting errors and affirmed it as reformed. The Supreme Court of Texas refused Hatchett's Application for Writ of Error without opinion and later denied rehearing. Appendix "B", infra.

At each stage of the legal proceedings, Hatchett has asserted that he is not liable on the guaranty agreement because the contract between Corky's and Williams was an illegal agreement under the anti-trust laws of the United States. See Paragraph 3, Third Amended Original Answer at Transcript 22 and 23; Paragraph 2 and 4, Motion for New Trial at Transcript 47; Points of Error 1-4 in Appellant's Brief before the Court of Civil Appeals, First Supreme Judicial District at Houston, Page 2-3; Application for Writ of Error in the Supreme Court of Texas, Points 4-6, at Pages 4-5; Motion for Rehearing before the Supreme Court of Texas, Pages 2-4.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH WELL-ESTABLISHED PRINCIPLES OF ANTI-TRUST LAW CONCERNING PRICE-FIXING.

Numerous cases of this Court have established the proposition that price-fixing is contrary to the policy of competition underlying the Sherman Act, and the illegality of price-fixing does not depend on a showing of unreason-

* "Transcript" refers to the Transcript of Record before the Court of Civil Appeals; other references to the record are clearly identified.

ableness. Price-fixing is conclusively presumed to be unreasonable. E.g., *Albrect v. Herald Company*, 390 U.S. 145 (1968); *United States v. McKesson & Robbins Company, Inc.*, 351 U.S. 305 (1956); *Kiefer Stewart v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *United States v. Socony Vacuum Oil Company*, 310 U.S. 150 (1940). This *per-se* illegality applies to contracts that fix minimum retail prices. *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). Petitioner Hatchett argued before the Court of Civil Appeals that the contract between Corky's and Williams was a price-fixing agreement.

In its opinion, the Court of Civil Appeals concluded that the contract was not a price-fixing agreement at all. 437 S.W.2d at 338-339. It concluded that the contract must be analyzed in terms of the Rule of Reason, which would require Hatchett to prove that the contract was an "unreasonable" restraint of trade. 437 S.W.2d at 339. Hatchett introduced no evidence in the Trial Court that the contract was "unreasonable".

The crucial clauses of the contract are Clauses 7 and 8, which read as follows:

"(7) Corky's shall have the exclusive right to fix and determine the price at which each item shall be sold. However, *without the expressed authority of Williams; the retail price shall not be less than gross cost plus twenty (20%) percent*, which percentage is hereinafter sometimes called the "mark-up". With respect to items purchased by Corky's from Williams under the ninety (90) day provision hereinafter set forth, the sales price shall be at the sole discretion of Corky's.

"(8) On the first banking day following the date of sale, Corky's shall deposit in The First National Bank of

Shreveport to the credit of Williams, an amount equal to the gross cost plus fifty (50%) percent of the mark-up of each item sold. Williams shall be furnished daily with a list of items sold the previous day together with cost and mark-up of each item, sales slips and bank deposit slip." (Emphasis added.)

Respondent Williams successfully argued in the Court of Civil Appeals that the above clauses did not agree to fix prices. According to the Respondent's argument, these clauses merely established that Williams was to receive a minimum price of gross cost plus fifty (50%) percent of the mark-up. Respondent also relied on the language in Clause 7 that "Corky's shall have the exclusive right to fix and determine the price at which each item shall be sold . . ."; 437 S.W.2d at 338.

It is clear that the contract was an agreement to fix a minimum retail price. Looking directly to the language of Clause 7, we find the following: ". . . the *retail price* shall not be less than gross cost plus twenty (20%) percent, which percentage is hereinafter sometimes called the 'mark-up' . . ." While the clause nominally gave Corky's the right to set the prices, it also established a floor on those prices. No matter what business conditions dictated, Corky's could not set the prices at less than gross cost plus twenty (20%) percent without the approval of Williams.

The construction given the contract by the Court of Civil Appeals would justify a reversal without further proceedings in this Court. The lower court not only shut out economic reality, it went beyond the plain meaning of the words in the contract in order to conclude that there was no price-fixing. The Supreme Court's failure to review

this case may result in Texas businessmen copying and perpetuating the price-fixing language approved by the Court of Civil Appeals. Such a result would undermine the long line of decisions of this Court establishing price-fixing as a *per se* violation of the anti-trust laws.

II.

THE INSTANT CASE RAISES IMPORTANT QUESTIONS CONCERNING THE CASE OF *SIMPSON v. UNION OIL OF CALIFORNIA.*

Prior cases in this Court have allowed price-fixing agreements in legitimate consignment contracts. E.g., *United States v. General Electric Company,* 272 U.S. 476 (1926). Generally, in order to qualify as a consignment, the contract must not obligate the retailer to pay for the goods. Where the retailer must pay for the goods, the contract is one of sale, under which a price-fixing agreement would be illegal. See *Note*, "Agency System of Price Maintenance", 43 Iowa L. Rev. 603 (1958).

In the instant contract, Clause 9 had a forced-sale provision which reads as follows:

"(9) At the request of Williams, Corky's shall purchase and immediately pay for any item received by the store more than ninety (90) days prior to the demand. The purchase price shall be the gross cost plus five (5%) percent . . ."

Since there was no provision in the contract for Corky's voluntary return of the goods, it appears Corky's was obligated whether or not the goods could be sold.

Even if the contract in question is a true consignment and not merely a well-disguised sale, the price-fixing por-

tion of the contract may be illegal because of this Court's holding in *Simpson v. Union Oil of California,* 377 U.S. 13 (1964). In *Simpson,* this Court held that a retail price maintenance agreement was illegal in an otherwise legitimate consignment agreement. The Texas courts failed to confront the question whether *Simpson* controlled the instant case.

The *Simpson* case raises important questions of concern to the business community. Even though *Simpson* was decided and published more than four (4) months before the contract between Corky's and Williams was made, it did not deter Williams' attorney from drafting a minimum retail price clause into the contract. In the *Simpson* case, the comment was made that one could still place a rug or painting on consignment with a dealer and hold him to a minimum retail price. 377 U.S. at 18. Such language detracts from an otherwise clear mandate prohibiting price-fixing arrangements in consignment agreements. Petitioner submits that *Simpson* applies where, as in the instant case, there is a price-fixing agreement in any kind of mass-merchandising scheme. Such a reading of *Simpson* would enable the Courts to implement the anti-trust policy against price-fixing without having to go into the question of whether a particular contract was a "true" consignment or in actuality a sale. It would preserve the law's interest in a man's freedom to set the prices of his business in accordance with his own judgment. See *Albrect v. Herald Company,* 390 U.S. 145, 151 (1968). It would also advance the general anti-trust policy favoring lower consumer prices. At the same time, such a reading would not prevent the de minimus transactions in which persons placed unique, individual items with a dealer on consignment.

Today, it is not clear to what extent, if at all, it is still possible to use a consignment as a price-fixing device and as a vehicle for securing an investment in retail merchandise. This question was not answered completely by the Simpson case and has not been answered by the subsequent decisions of this Court or of the lower courts. It was certainly not answered by the Texas courts in the instant case, because the Texas courts never faced the issue. The *Simpson* case is an important step in implementing this Court's long established policy against price-fixing. This Court should review the instant case to clarify the conditions, if there are any, in which a consignment may be used to set minimum retail prices.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District at Houston, Texas.

Respectfully submitted,

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APPENDIX "A"

(437 S.W.2d 334)

ROBERT L. HATCHETT, JR., Appellant,

v.

C. W. WILLIAMS, Appellee.

No. 15,387.

Court of Civil Appeals of Texas.

Houston (1st Dist.).

Dec. 30, 1968.

Opinion on Remittitur Jan. 9, 1969.

Rehearing Denied Jan. 30, 1969.

Action by supplier against retailer for breach of contract whereby supplier was to be paid for suppying all ready-to-wear clothing to be sold in one of retailer's stores and against guarantor for breach of guaranty agreement. The District Court, Harris County, Warren P. Cunningham, J., entered judgment in favor of supplier, and guarantor appealed. The Court of Civil Appeals, Peden, J., held that contract which granted exclusive right to supply whatever ready-to-wear merchandise retailer chose to offer for sale in a particular store over one-year period with option to renew contract for nine additional periods of one year each and option to extend contract to other retail outlets and in which supplier set minimum price he would receive for goods would not lessen competition nor tend to create monopoly and thus enforcement of contract and of guaranty agreement based on it was not precluded under state statutes or Sherman Anti-Trust Act.

Reformed and affirmed.

(437 S.W.2d 334)

1. Commerce Key 40(1)

Where Hong Kong ready-to-wear clothes purchased by retailer from supplier moved in foreign and interstate commerce, contract under which purchases were made was subject to trade regulation statutes of the United States.

2. Contracts Key 325

Contract which is entered into in one state and is to be partly performed in another state is governed by laws of state where contract was entered into except where parties intended otherwise.

3. Contracts Key 325

Where supplier, who entered contract in Louisiana with retailer to place merchandise in retailer's stores, did not exercise option to place merchandise in any stores outside state and only permitted merchandise he had placed in one store to be moved to Texas store, Louisiana law rather than Texas law applied.

4. Monopolies Key 12(1)

If natural tendency or probable effect of combination or monopoly is restraint of trade by stifling competition or to discourage enterprise and industry, combination or monopoly is deemed to be detrimental to public welfare and falls within teeth of the law.

(437 S.W.2d 335)

5. Monopolies Key 12(1.10)

Under Sherman Anti-Trust Act, only undue or unreasonable restraints of interstate or foreign commerce are prohibited; the fundamental test of reasonableness of restraint is its effect on public; and except where the con-

tract is on its face violation of the act, it is necessary to look beyond contract to all other facts and circumstances material to the particular case.

6. Monopolies Key 17(2.8)

Contract which granted exclusive right to supply whatever ready-to-wear merchandise retailer chose to offer for sale in a particular store over one-year period with option to renew contract for nine additional periods of one year each and option to extend contract to other retail outlets and in which supplier set minimum price he would receive for goods would not lessen competition nor tend to create monopoly and thus enforcement of contract and of guaranty agreement based on it was not precluded under state statutes or Sherman Anti-Trust Act. LSA-R.S. 51:121-51:124.

7. Trial Key 350(4)

In absence of evidence that seller received timely notice that delivery of guaranty agreement was conditional, refusal to submit guarantor's requested special issues as to guarantor's intent regarding effective date and whether guarantor informed retailer of such intent was not error.

8. Guaranty Key 12

Conditional delivery of guaranty instrument must be brought home to obligee in order to relieve guarantor of his obligation expressed in guaranty agreement which he has signed.

9. Sales Key 168½(5)

Where contract between supplier and retailer provided that supplier need not accept any item delivered to re-

tailer more than 120 days prior to delivery and supplier delivered no more items to retailer after he received guaranty agreement, supplier was not required to accept items attempted to be returned more than 120 days after he received guaranty agreement by which guarantor agreed to reimburse supplier for gross cost of supplier's goods in possession of retailer.

10. Customs Duties Key 93

Where supplier had not paid import duty on merchandise held by U. S. customs he was not entitled to be reimbursed for such duty in view of his witness' testimony that it was retailer's responsibility to get merchandise out of customs.

Moore & Morris, Thomas W. Moore, Jr., Houston, for appellant.

William Key Wilde, John R. Cope, Houston, for appellee, Bracewell & Patterson, Houston, of counsel.

PEDEN, Justice.

C. W. Williams filed this suit for damages against Corky's Hong Kong Clothes, Inc., for breach of a contract whereby he was to be paid for supplying all the ready-to-wear clothing to be sold in the corporation's Shreveport, Louisiana, store and against Robert L. Hatchett, Jr. for breach of his guaranty agreement in favor of Williams. A default judgment was entered against Corky's Hong Kong Clothes, Inc. (which we will call Corky's), and it has not filed an appeal. After a jury trial Hatchett has perfected this appeal from the judgment of the trial court in favor of Williams in the amount found by the jury, $15,030.69.

(437 S.W.2d 335)

Appellant's points of error assert that the original contract between Williams and Corky's was void because it was in restraint of trade; that the trial court erred in refusing certain special issues submitted by appellant inquiring whether his signing of the guaranty agreement was conditioned on his being joined by a certain other guarantor. Further, that the verdict will not support the judgment. He also raises points of no evidence, insufficient evidence to support the judgment and asserts that the judgment is against the great weight of the evidence. He presents in the alternative a point that if appellee is to prevail appellant is entitled to an offset of $1,422.31.

(437 S.W.2d 336)

The original contract (as it will be called in this opinion) between Corky's and Williams, the appellee, was executed in Shreveport on October 7, 1964. It recited that Corky's was a Texas corporation duly qualified to do business in Louisiana, that Williams was a resident of Caddo Parish, Louisiana, that Corky's owned several stores, one of which was in Shreveport, that sold "made to measure" suits made in Hong Kong and that it would be of considerable financial advantage to Corky's if it had Hong Kong tailored ready-to-wear suits and similar items to sell. Also, that Williams desired to purchase such ready-to-wear items and place them for sale with Corky's. The relevant contract provisions, with emphasis added, were:

"(1) Williams is * * * granted the exclusive right to furnish all merchandise that is sold *in the store known as 'Corky's Hong Kong Clothes', Petroleum Tower, Shreveport, Louisiana,* with the exception of made to measure items of clothing.

"(2) Williams will purchase from time to time items

of ready to wear clothing for both men and women. The purchases will be made in Hong Kong or such other place or places as may be mutually agreeable to Corky's and Williams. Williams will cause such items to be shipped to Corky's store in Shreveport, Louisiana, pay all shipping costs and custom tariffs or charges.

"(3) *Upon arrival in Shreveport, Louisiana,* the items will be inventoried; cost of each item to include customs charges and its proportion of all shipping costs. * * * The cost as thus determined, shall be sometimes referred to hereinafter as 'gross cost' * * *.

"(4) *The merchandise will remain the property of Williams until sold to customers or purchased,* as hereinafter provided, by Corky's.

"(5) Williams will maintain an inventory of ready to wear items of not less than FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS, gross costs. * * * At no time shall such inventory be in excess of TWENTY THOUSAND AND NO/100 ($20,000.00) DOLLARS, without the mutual consent of both parties. *Provided, however, that items purchased by Corky's under the ninety (90) day provision shall not be included as a portion of the inventory.* * * *

"(6) With respect to the purchase of the ready to wear items by Williams, it is understood that Corky's shall have the exclusive right and the obligation to select the merchandise and to negotiate the price to be paid the manufacturer or tailor. However, Corky's shall have no general authority to obligate Williams and must have specific authority from Williams for each order to include the maximum amount to be paid the tailor, manufacturer or exporter for the shipment. Williams shall also have the same rights to make such purchases with Corky's consent.

(437 S.W.2d 336)

"(7) *Corky's shall have the exclusive right to fix and determine the price at which each item shall be sold.* However, without the expressed authority of Williams, the retail price shall not be less than gross cost plus twenty (20%) percent, which percentage is hereinafter sometimes called the 'mark-up'. *With respect to items purchased by Corky's from Williams under the ninety (90) day provision hereinafter set forth, the sales price shall be at the sole discretion of Corky's.*

"(8) On the first banking day following the date of sale, Corky's shall deposit in The First National Bank in Shreveport to the credit of Williams, an amount equal to the gross cost plus fifty (50%) percent of the mark-up of each item sold. Williams shall be furnished daily with a list of items sold the previous day together with cost and mark-up of each item, sales slips and bank deposit slip.

(437 S.W.2d 337)

"(9) At the request of Williams, Corky's shall purchase and immediately pay for any item received by the store more than ninety (90) days prior to the demand. The purchase price shall be the gross cost plus five (5%) percent. Williams shall have the right to remove any merchandise which he has furnished, which has been in the store for more than ninety (90) days. *At any and all reasonable times, Williams may inventory the merchandise placed in the store under this agreement.* Any items not in the store shall be considered as having been sold as a normal store sale unless the store has been robbed or burglarized and evidence of such robbery or burglary is established.

"(10) In the event a petition is filed for the bankruptcy of Corky's, either voluntary or involuntary, * * *

Williams shall have the right to remove all of his unsold items without payment of any kind to Corky's. * * * In the event Williams shall be reasonably apprehensive that the merchandise placed in Corky's store or stores is in jeopardy from the claim of creditors or from poor management, he may call upon Corky's for security acceptable to him. In the event Corky's should fail or refuse to provide such security, Williams may at his option remove the merchandise placed by him in the store and terminate this agreement. * * *

"* * *.

"(12) It is further agreed that at the option of Williams, this contract shall extend to and cover all other retail outlets which Corky's now owns or may acquire during the life of this contract. In such event the gross cost of each item shall be computed at the local store and not the Shreveport, Louisiana store. This option must be exercised within six (6) months from date as to each store or retail outlet now owned by Corky's and within sixty (60) days after the opening of each new store or retail outlet.

"(13) * * *.

"(14) This contract and agreement shall be and remain in full force and effect for a period of one (1) year from date. Corky's further grants to Williams the option to renew and/or extend this contract * * * for nine (9) additional consecutive periods of one (1) year each, * * *" by his depositing in the Central National Bank at Houston, Texas to the credit of Corky's $1,000.00 for one year's renewal on or before 60 days from the anniversary date of this contract.

Mr. A. L. "Corky" Jackson, president of Corky's tes-

tified that early in 1965 the corporation was in a state of bankruptcy and that he wanted to move to a new Dallas store the merchandise which was on consignment from Williams in the Shreveport store. He asked Williams for permission and Williams agreed to give it provided he received sufficient securities.

Williams' attorney prepared the guaranty agreement. It refers to the original contract summarized above and guarantees that Williams will be paid the gross cost of the merchandise he had placed in Corky's which was valued at $17,772.78, less the gross cost of any merchandise returned to Williams which had been held by Corky's for 120 days or less. The guaranty agreement recites that it was recognized that Williams had the right under paragraph 10 of the original agreement to terminate it and remove the merchandise and be fully protected from loss. The guaranty agreement was executed by appellant, who was a stockholder and director of Corky's, on February 9, 1965 at Houston.

[1] It is uncontroverted that the goods purchased under the original contract moved in foreign and interstate commerce. Appellant alleged by proper pleadings that the original contract was in restraint of trade, lessened competition, created a monopoly and thereby violated the statutes of the United States and of Texas. Also that it was in violation of Louisiana statutes, LSA-R.S. 51:121-51:124, inclusive. It is clear that we must consider the contract subject to the statutes of the United States. As to the applicability of the statutes of the states of Texas and Louisiana, there is nothing in the record which indicates that the parties intended that the contract should be governed by the laws of any state other than the one where it was made, Louisiana.

[2, 3] "A contract made in one state to be performed partly in one state and partly in another will be governed by the laws of the state where made unless the parties intend otherwise." 12 Tex.Jur.2d 310, Conflict of Laws, § 11; Grace v. Orkin Exterminating Co., Inc., 255 S.W. 2d 279 (Beaumont, Tex. Civ. App. 1953, writ ref., n.r.e.). Appellee never did exercise his option to place merchandise in any of the Corky's stores other than the Shreveport one; after execution by appellant of the guaranty agreement he only permitted merchandise he had placed in the Shreveport store to be moved to one in Dallas and later to Houston. For these reasons, we do not apply Texas law to determine whether the original contract was, as appellant contends, in restraint of trade, illegal, void, unenforceable and in violation of the anti-trust statutes of Texas.

As to the applicability of Louisiana statutes, the ones pleaded and proven by appellant provide in part that 1) contracts in restraint of trade or commerce are illegal, 2) no person shall monopolize or attempt to do so or combine or conspire to monopolize any part of the trade or commerce within this state and 3) no person engaged in commerce shall sell or contract to sell goods for use within this state or fix a price on the agreement that the purchaser shall not deal in the goods of a competitor of the vendor where the effect of the sale or contract for sale is to substantially lessen competition or tends to create a monopoly in any line of commerce.

Appellant has offered no proof apart from the terms of the original contract itself as to whether its effect is to "substantially lessen competition", as to whether it "tends to create a monopoly" or as to whether it is "in restraint

of trade or commerce", so we look to the contract alone for this determination.

Item 6 of the contract provided that Corky's shall have the exclusive right to select the merchandise while giving Williams control over the maximum amount to be paid for it. It did not restrict the brands of merchandise to be sold. At most it merely granted to appellee an exclusive right to supply whatever ready-to-wear merchandise Corky's chose to offer for sale in its Shreveport store and to do so over a one year period with option to renew the contract for nine additional periods of one year each. Even if Williams had exercised his other option to extend the agreement to Corky's other stores the provisions of the original contract would neither lessen competition nor tend to create a monopoly. New Orleans Cigarette Service Corp. v. Sicarelli, 73 So.2d 339 (Ct. App. La., 1954), citing 17 C.J.S. Contracts § 255, p. 1151.

[4] "If the natural tendency or probable effect of the combination or monopoly is the restraint of trade by stifling competition or to discourage enterprise and industry, the combination or monopoly is deemed to be detrimental to the public welfare and falls within the teeth of the law." Tooke and Reynolds v. Bastrop Ice and Storage Co., 172 La. 781, 135 So. 239 (1931). The original contract tends neither to stifle competition nor to discourage enterprise and industry. Nor does Williams reserve the right to fix prices; item 7 states that Corky's has that exclusive right. Williams merely sets the minimum price he is entitled to receive from Corky's. We find nothing in the Louisiana statutes pleaded by appellant which precludes enforcement of the original contract or of a guaranty agreement based on it.

(437 S.W.2d 339)

[5, 6] We turn to the applicability of Federal statutes. Under the Sherman Anti-Trust Act, only undue or unreasonable restraints of interstate or foreign commerce are prohibited; the "fundamental test of the reasonableness of restraint is its effect on the public; and except where a contract is on its face a violation of the act, it is necessary to look beyond the contract to all other facts and circumstances material to the particular case." 58 C.J.S. Monopolies § 23, pp. 988-989. We have noted that the original contract did not provide for Williams to fix prices of the merchandise. We find no violations of the act on the face of the original contract, and appellant has not shown by other facts and circumstances that the contract provides for an unreasonable restraint of trade. Nor has he requested special issues inquiring as to whether it does so. We find that appellant has failed to establish that the original contract was void and unenforceable because contrary to federal law and public policy and in restraint of trade. We overrule appellant's first four points.

[7, 8] Appellant's fifth, sixth and seventh points complain of the refusal by the trial court to submit appellant's requested special issues B, C and D. His requested Issue B asked whether appellant signed the guaranty agreement with the understanding that it would not become effective unless Robert C. Aitken signed it. His Issue C inquired of the jury if appellant informed A. L. "Corky" Jackson that the guaranty agreement would not become effective unless Aitken signed it. Appellant's requested Issue D asked whether Aitken informed Williams' attorney that he (Aitken) would not sign the guaranty agreement with Hatchett. Such issues are supported by the evidence, and they were timely submitted to the trial judge. Appellant

contends that favorable answers to such issues would have made him entitled to prevail in this case because he would have thus established that his delivery of the guaranty agreement was conditioned on Robert Aitken's having joined him, which Aitken never did. We overrule these points. There is no evidence that Williams received timely notice that the delivery of the guaranty agreement was conditional. "The law is well settled that a conditional delivery of a guarantee instrument must be brought home to the obligee in order to relieve a guarantor of his obligation expressed in a guaranty agreement which he has signed." Eastman Oil Well Survey Co. v. Hamil, 416 S.W.2d 597 (Houston, Tex. Civ. App., 1967, writ ref., n.r.e.), citing cases.

Appellant's eighth point of error states that the trial court erred in rendering judgment for appellee and in overruling appellant's motion for new trial because the finding of the jury as to appellee's damages will not support a judgment against appellant. He argues that if the transactions contemplated under the original contract amounted to sales, such contract was void and unenforceable, an assertion we have already discussed. If the goods were placed with Corky's on consignment, he asserts, they still belong to Williams and the only provision requiring Corky's to pay for them was the one in paragraph 9 of the original contract, which states in part: "At the request of Williams, Corky's shall purchase and immedately pay for any item received by the store more than ninety (90) days prior to the demand * * *." Appellant points out that the record does not show that appellee requested Corky's to purchase and pay for any of the merchandise under such provision of paragraph 9; it does show that an attempt was made to return the merchandise to ap-

pellee early in 1966 prior to the filing of this suit, but that appellee refused to receive it.

[9] We overrule this point. The attempted return occurred more than 120 days after Williams received the guaranty agreement by which appellant agreed to reimburse appellee for the gross cost of appellee's goods then in possession of Corky's. Williams delivered no more items to Corky's after he received Hatchett's guaranty agreement. Appellant is not entitled to avoid the express limitation in his guaranty agreement on the merchandise which can be returned to Williams for credit: "Williams need not accept any item which has been delivered to Corky's more than 120 days prior to the delivery by the Guarantor to Williams, and Williams need not accept any item not in the same condition as when it was delivered to Corky's by Williams."

We have carefully studied the record of this cause and find that, except as will be noted in response to appellant's last point, the evidence is sufficient to support the judgment, so we overrule appellant's no evidence and "against the greater weight of the evidence" points.

[10] Appellant's last point asserts in the alternative that if appellee is entitled to prevail, the undisputed evidence shows that Corky's was entitled to offset credits in the amount of $1,422.31. We hold that the evidence supports the verdict with respect to each of the items raised by appellant except one: the $267.31 item which appellee's undisputed evidence shows to be the estimated amount to be paid as import duty on a shipment of merchandise still being held by U. S. Customs. Appellee has paid for the merchandise, so he is entitled to be reimbursed to that extent, but he has not paid the duty and

is not entitled to be reimbursed for it in view of his witness' testimony that it was Corky's responsibility to get the merchandise out of Customs. It is obvious from the record that the jury's verdict includes the $267.31 item, because the verdict awards all the appellee asked for. Under Rule 440, Texas Rules of Civil Procedure, we order that the judgment of the Trial Court be affirmed provided appellee files a remittitur of $267.31 within 14 days after the date of this opinion, otherwise, that it be reversed and remanded for new trial.

Reversed and remanded unless remittitur filed.

On Filing of Remittitur

On December 30, 1968, we indicated by a written opinion that if appellee, Mr. C. W. Williams, would file a remittitur of $267.31 within fourteen days after the date of that opinion, the judgment of the trial could would be affirmed; that otherwise the cause would be reversed and remanded. The appellee has filed the suggested remittitur of $267.31.

Accordingly, as of this date, the judgment of the trial court in favor of the appellee, C. W. Williams, is reformed by deducting the amount of $267.31 from the judgment recovered by him and, as so reformed, is affirmed.

All of the costs of appeal will be taxed against the appellant. The Trial Court costs will be taxed as they were taxed in that court.

Reformed and affirmed.

APPENDIX "B"

IN THE

Supreme Court of Texas

May 21, 1969.

No. B-1421

ROBERT L. HATCHETT, JR.

vs.

C. W. WILLIAMS

From Harris County, First District.

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Robert L. Hatchett, Jr. and surety, The Travelers Indemnity Company, pay all costs incurred on this application.

June 25, 1969.

No. B-1421

ROBERT L. HATCHETT, JR.

vs.

C. W. WILLIAMS

From Harris County, First District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 20th day of August, 1969.

GARSON R. JACKSON
Garson R. Jackson, Clerk

By _____, Deputy.

APPENDIX "C"

STATE OF LOUISIANA §
PARISH OF CADDO §

THIS CONTRACT AND AGREEMENT entered into by and between

CORKY'S HONG KONG CLOTHES, INC., a Texas corporation, duly qualified to do business within the State of Louisiana, herein represented by A. L. "Corky" Jackson, its President, herein sometime referred to simply as "Corky's",

and

C. W. WILLIAMS, SR., a resident of Caddo Parish, Louisiana, hereinafter sometime referred to simply as "Williams",

in the presence of the undersigned competent witnesses WITNESSETH:

WHEREAS, Corky's owns and operates several clothing stores, one of which is located in the Petroleum Tower, Shreveport, Louisiana, and at present sells "made to measure" suits and other like items. After receipt of the order, Corky's orders the suit custom made from its Hong Kong tailors. It would be of considerable financial advantage to Corky's, if it had Hong Kong tailored ready-to-wear suits, coats and similar items. Such stock would further increase its sale of custom made goods; and,

WHEREAS, Williams desires to purchase such ready to wear items and place them for sale with Corky's.

NOW, THEREFORE, for and in consideration of the mutual advantages accruing to the parties hereto, it is agreed as follows:

(1) Williams is hereby granted the exclusive right to furnish all merchandise that is sold in the store known as "Corky's Hong Kong Clothes", Petroleum Tower, Shreveport, Louisiana, with the exception of made to measure items of clothing.

(2) Williams will purchase from time to time items of ready to wear clothing for both men and women. The purchases will be made in Hong Kong or such other place or places as may be mutually agreeable to Corky's and Williams. Williams will cause such items to be shipped to Corky's store in Shreveport, Louisiana, pay all shipping costs and custom tariffs or charges.

(3) Upon arrival in Shreveport, Louisiana, the items will be inventoried; cost of each item to include customs charges and its proportion of all shipping costs, as will be ascertained at the time of inventory. The cost as thus determined, shall be sometimes referred to hereinafter as "gross cost". Each item will be code marked to indicate date of receipt in the store and the gross cost.

(4) The merchandise will remain the property of Williams until sold to customers or purchased, as hereinafter provided, by Corky's.

(5) Williams will maintain an inventory of ready to wear items of not less than FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS, gross costs. The inventory shall include the gross cost of the merchandise on hand and the estimated cost of the merchandise on order. At no time shall such inventory be in excess of

TWENTY THOUSAND AND NO/100 ($20,000.00) DOLLARS without the mutual consent of both parties. Provided, however, that items purchased by Corky's under the ninety (90) day provision shall not be included as a portion of the inventory. However, Williams may, with the approval of Corky's, increase the inventory.

(6) With respect to the purchase of the ready to wear items by Williams, it is understood that Corky's shall have the exclusive right and the obligation to select the merchandise and to negotiate the price to be paid the manufacturer or tailor. However, Corky's shall have no general authority to obligate Williams and must have specific authority from Williams for each order to include the maximum amount to be paid the tailor, manufacturer or exporter for the shipment. Williams shall also have the same rights to make such purchases with Corky's consent.

(7) Corky's shall have the exclusive right to fix and determine the price at which each item shall be sold. However, without the expressed authority of Williams, the retail price shall not be less than gross cost plus twenty (20%), percent, which percentage is hereinafter sometimes called the "mark-up". With respect to items purchased by Corky's from Williams under the ninety (90) day provision hereinafter set forth, the sales price shall be at the sole discretion of Corky's.

(8) On the first banking day following the date of sale, Corky's shall deposit in The First National Bank in Shreveport to the credit of Williams, an amount equal to the gross cost plus fifty (50%) percent of the mark-up of each item sold. Williams shall be furnished daily with a list of items sold the previous day together with cost

and mark-up of each item, sales slips and bank deposit slip.

(9) At the request of Williams, Corky's shall purchase and immediately pay for any item received by the store more than ninety (90) days prior to the demand. The purchase price shall be the gross cost plus five (5%) percent. Williams shall have the right to remove any merchandise which he has furnished, which has been in the store for more than ninety (90) days. At any and all reasonable times, Williams may inventory the merchandise placed in the store under this agreement. Any item not in the store shall be considered as having been sold as a normal store sale unless the store has been robbed or burglarized and evidence of such robbery or burglary is established.

(10) In the event a petition is filed for the bankruptcy of Corky's, either voluntary or involuntary, or in the event of any assignment by Corky's to, or arrangement to or with its creditors in order to avoid bankruptcy, Williams shall have the right to remove all of his unsold items without payment of any kind to Corky's. In such case this agreement shall be ipso facto terminated. In the event Williams shall be reasonably apprehensive that the merchandise placed in Corky's store or stores is in jeopardy from the claim of creditors or from poor management, he may call upon Corky's for security acceptable to him. In the event Corky's should fail or refuse to provide such security, Williams may at his option remove the merchandise placed by him in the store and terminate this agreement. In the further event that Corky's should breach any obligation assumed by it in this contract, and should within ten (10) days fail to comply with same,

this agreement may, at the option of Williams, be terminated, and the merchandise placed in the store or stores removed without payment of any kind to Corky's. In this connection if this contract is terminated by Williams for failure or refusal of Corky's to perform or meet the obligations herein imposed and assumed by it, in addition to the right to remove his merchandise and terminate this contract, Williams shall have the right to damages for such breach. The amount of the damages shall be the profit which Williams could reasonably have expected with ordinary operations during the life of the contract, provided, such damages shall in no case be less than eight (8) times the profit realized by Williams during any quarter of the twelve (12) months next preceeding the date of termination of the contract. For purposes of this provision, a quarter shall be considered as any three (3) consecutive calendar months. It is specifically understood and agreed that no extensions or forebearances in the failure to exercise the rights herein granted Williams shall be deemed to have effected a change in this contract.

(11) In the event of the voluntary liquidation of Corky's at a time when it is solvent, and this agreement is thus avoided, Corky's shall pay Williams as liquidated damages a sum equal to the profits realized by Williams during the period of twelve (12) months next preceeding the earlier of the following dates:

(a) Date the Shreveport store is closed for business,

or

(b) Date of the shareholders' meeting which provides for such dissolution.

In this connection, if the Shreveport store is sold to any person, firm or corporation, as a franchise store, the merchandise of Williams shall be sold the purchaser at gross cost plus 15% of said cost, and Williams paid such sum for the merchandise.

(12) It is further agreed that at the option of Williams, this contract shall extend to and cover all other retail outlets which Corky's now owns or may acquire during the life of this contract. In such event the gross cost of each item shall be computed at the local store and not the Shreveport, Louisiana store. This option must be exercised within six (6) months from date as to each store or retail outlet now owned by Corky's and within sixty (60) days after the opening of each new store or retail outlet.

(13) Corky's has heretofore opened certain stores or retail outlets. These outlets have been sold to third persons and Corkey's has a franchise right to supply such store with merchandise. It is anticipated that Corky's will "franchise" additional stores throughout the nation. Corky's grants to Williams the option to the exclusive right to furnish the frainchised outlets with all their merchandise except their made-to-measure items, as provided in the franchise agreement. The price for each item shall be gross cost plus a sum equal to fifty (50%) percent of the difference between such gross cost and the amount paid Corky's by such franchised outlet, or ten (10%) percent of gross costs, whichever is the greater. This option shall be exercised within six (6) months from date as to each outlet now covered by a franchise, and within sixty (60) days after the opening of any additional franchised outlets. Williams may elect to furnish some but not all such stores, and the failure to exercise his option as to one shall not

affect his right as to any newly opened store. In the event Williams shall elect to provide merchandise under the franchise agreement, payment of each shipment shall be made by the franchised outlet upon delivery.

(14) This contract and agreement shall be and remain in full force and effect for a period of one (1) year from date. Corky's further grants to Williams the option to renew and/or extend this contract (in full force and effect under the same terms and conditions as set forth above) for nine (9) additional consecutive periods of one (1) year each, upon compliance with the following conditions:

> On or before sixty (60) days from the anniversary date of this contract, Williams shall pay or tender to the credit of Corky's Hong Kong Clothes, Inc. at the Central National Bank at Houston, Texas (which bank and its successors are Corky's agent and shall continue as the depository for all sums to be paid under the provisions of this paragraph), the sum of ONE THOUSAND AND NO/100 ($1,00.00) DOLLARS, which shall cover the payment for the extension or renewal of this contract for an additional one (1) year period. The payment may be made by check or draft mailed or delivered to said bank on or before such date of payment. If such bank (or any successor bank) should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept said payment, Williams shall not be held in default for failure to make such payment or tender until thirty (30) days after Corky's shall have delivered to Williams an instrument naming and designating another bank as agent to receive such payments or tender.

The deposit or tender of the aforesaid sum shall be considered for all purposes as an exercise of the option to renew and/or extend this contract in full force and effect for an additional period of one (1) year calculated from the anniversary date of this agreement.

The failure of Williams to make such tender shall result in a termination of this agreement.

This agreement and the terms and provisions hereof shall be binding upon the parties hereto, their respective heirs, successors and assigns forever.

IN WITNESS WHEREOF this agreement is entered into on this the 7th day of October, 1964, effective as of the 7th day of October, 1964.

WITNESSES:

DONALD L. BORDELON

FRED D. ROGERS

DONALD L. BORDELON

FRED D. ROGERS

CORKY'S HONG KONG CLOTHES, INC.

By:
A. L. CORKY JACKSON
A. L. "Corky" Jackson, President

C. W. WILLIAMS, SR.
C. W. Williams, Sr.

TOM MOHY
Notary Public in and for Harris County, Texas

STATE OF LOUISIANA §
PARISH OF CADDO §

BEFORE ME, the undersigned Notary Public, on this day personally appeared DONALD L. BORDELON, who being by me duly sworn, stated under oath that he was

one of the subscribing witnesses to the foregoing instrument and that the same was signed by A. L. "CORKY" JACKSON, in his capacity as President of Corky's Hong Kong Clothes, Inc., in his presence and in the presence of their subscribing witness.

DONALD L. BORDELON

SWORN TO AND SUBSCRIBED before me on this the 7th day of October, 1964.

TOM MOHY
Notary Public

STATE OF LOUISIANA §
PARISH OF CADDO §

BEFORE ME, the undersigned Notary Public, on this day personally appeared DONALD L. BORDELON, who being by me duly sworn, stated under oath that he was one of the subscribing witnesses to the foregoing instrument and that the same was signed by C. W. WILLIAMS, SR., in his presence and in the presence of the other subscribing witness.

DONALD L. BORDELON

SWORN TO AND SUBSCRIBED before me on this the 7th day of October, 1964.

Notary Public
TOM MOHY

APPENDIX "D"

STATE OF TEXAS §
COUNTY OF HARRIS §

KNOW ALL MEN BY THESE PRESENTS, that this day before me, the undersigned Notary Public, duly commissioned and qualified in and for the aforesaid County and State, and in the presence of the undersigned competent and attesting witnesses, personally came and appeared

ROBERT L. HATCHETT, JR.
hereinafter sometime called "Guarantor"
whether one or more,

who declared that:

(1) C. W. Williams (hereinafter sometime referred to simply as "Williams") and Corky's Hong Kong Clothes, Inc. (hereinafter sometime referred to simply as "Corky's") entered into a certain contract and agreement of date October 7, 1964, a copy of which is attached hereto;

(2) Pursuant to the terms of the agreement Williams has placed merchandise in Corky's retail stores having a gross cost as defined in said contract, of Seventeen Thousand Seven Hundred Seventy-two and 78/100 ($17,772.78) Dollars;

(3) Pursuant to the provisions of paragraph 10 of the aforesaid contract, Williams has heretofore called upon Corky's for security to protect Williams from loss and has advised Corky's that a letter of guaranty by the Guarantor is acceptable and will be accepted as such security;

(4) It is recognized by all parties, including the Guarantor, that Williams has the right, under terms of the contract to remove the merchandise from the retail outlets of Corky's and to terminate the contract, a copy of which is attached, unless the requested security is provided, and it is further recognized that as of this date, no liens, judgments or other encumbrances have attached to or affect said merchandise and the same is not under seizure so that at the present time Williams could remove the merchandise and be fully protected from loss;

(5) Corky's has requested Guarantor to furnish this security and for adequate consideration, the receipt, adequacy and sufficiency of which is hereby acknowledged by the Guarantor, Guarantor desires to guarantee Williams against loss under the terms of the contract to the extent herein provided.

NOW THEREFORE, for and in consideration of the premises and of the benefits accrued and to accrue to the Guarantor, the receipt and sufficiency of which is hereby acknowledged, the said Guarantor does by these presents:

(a) Give and Grant this continuing guaranty to Williams, his heirs, successors or assigns for the payment in full of the gross cost, as defined in the contract, a copy of which is attached, of all merchandise placed by Williams in any retail outlet of Corky's (to include merchandise moved from one store or retail outlet to another store or retail outlet by Corky's with or without the consent of Williams), provided this guaranty shall not exceed the present inventory of Seventeen Thousand, Seven Hundred Seventy-two and 78/100 ($17,772.78) Dollars.

(b) Guarantee Williams the reimbursement against any loss for merchandise not to exceed the above mentioned sum, although it is understood that from

this sum will be deducted the gross cost of any item of merchandise owned by Williams which is returned to him in the same condition received by Corky's from Williams, all as hereinafter provided. Further understand that should the inventory exceed the above stated sum, the return of merchandise having a gross cost of the above mentioned sum shall satisfy the terms and provisions of this obligation and guaranty.

(c) Further understand and agree that with respect to this guaranty, should Guarantor so elect, he may at any time relieve himself of this obligation by delivering to Williams all of the merchandise in any retail outlet of Corky's placed therein by Williams, and upon the further payment of the difference, if any, between gross cost of the merchandise returned and the amount of this guaranty, the cash payment shall be due and payable immediately upon delivery of such merchandise and shall bear interest at the rate of eight (8%) per cent per annum from that date until paid. Agree that in the event Guarantor elects to relieve himself of this obligation as provided in this paragraph, it is understood that:

(1) Williams shall be advised by registered mail duly addressed to the address set forth as follows,

936 Candler Avenue
Shreveport, Louisiana

or such other address as Williams may from time to time furnish Guarantor, of the election of the Guarantor to deliver the merchandise to Williams, and the said delivery will be made not earlier than ten (10) days after actual receipt of the notification by Williams, and not later than

fifteen (15) days after actual receipt of said notification (unless otherwise mutually agreed upon by Williams and the Guarantor).

(2) The merchandise shall be delivered to a place within the City of Shreveport, Louisiana, designated by Williams unless a different location is mutually agreed upon by Williams and the Guarantor.

(4) Williams need not accept any item which has been delivered to Corky's more than 120 days prior to the delivery by the Guarantor to Williams, and Williams need not accept any item not in the same condition as when it was delivered to Corky's by Williams.

(5) Items so delivered shall be free of liens, mortgages and other encumbrances.

It is further specifically understood and agreed that:

(1) Williams may extend any obligation of Corky's one (1) or more times and surrender any securities or merchandise held by him without notice to or consent from the Guarantor, and Guarantor shall remain at all times bound hereby notwithstanding such extensions or surrender.

(2) Williams shall be under no obligation to determine whether the merchandise, when delivered to Corky's, was in fact used by Corky's in its own stores or in franchise outlets or whether such merchandise was sold for cash or credit. If the merchandise is not in one of Corky's retail outlets and cannot be recovered, it shall be considered as sold.

(3) Guarantor does by these presents further declare that this continuing guaranty is absolute and complete and an acceptance or notice of acceptance

thereof by Williams is therefore unnecessary and such acceptance or notice of acceptance is hereby waived, it being sufficient for purposes of this guaranty that credit is extended and/or merchandise of Williams remain with Corky's or continue to be placed with Corky's.

(4) Unless terminated under the provisions of sub-paragraph "c" above, this guaranty shall continue in full force and effect until October 7, 1965 and thereafter for a period of six (6) months as to any items of merchandise delivered to Corky's prior to October 7, 1965.

(5) Notwithstanding this guaranty, it is understood that all rights of Williams under the terms of the attached contract shall remain in full force and effect and this guaranty shall be additional security rather than a limitation of the rights of Williams.

(6) In the event the Guarantor includes two (2) or more persons, whether natural or corporate, the obligations herein assumed shall be joint and several, and in solido, and each Guarantor so binds himself, his heirs, successors, administrators, executors and assigns forever.

IN WITNESS WHEREOF, this instrument is executed on this the 9th day of February, 1965, in the presence of the undersigned competent and attesting witnesses and me, Notary, after due reading of the whole.

WITNESSES:

A. L. JACKSON ROBERT L. HATCHETT, JR.

DAVID W. HATCHETT

Notary Public in and for Harris County, Texas

E. E. BUSTIN

My Commission Expires: 6/1/65